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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EREN HUSSEIN et al., Plaintiffs and Appellants, v. DAVID DRIVER et al., Defendants and Appellants.	A144786 & A145655 (San Francisco City & County Super. Ct. No. CGC-08-483062)

I.

INTRODUCTION

These consolidated appeals arise from an eight-year dispute over the rights to a parking space in San Francisco. After many years of litigation and two prior appeals to this court in 2010 and 2014, the trial court awarded defendants David Driver and his wife Emelia Rallapalli (the Drivers) and her parents Krishna and Philippine Rallapalli (the Parents) attorney fees. Plaintiffs Janice and Gary Grote (the Grotes) and Eren Hussein (Hussein) separately appealed the attorney fee awards. The court awarded attorney fees to defendants under the attorney fees provision in the Homeowners Association

Declaration (Declaration) for multiple claims including slander of title, interference with contract, and trespass.[1]

We conclude the right to recover attorney fees is far more limited. The trial court erred in awarding the Drivers attorney fees to defend against the tort claims that were not brought to enforce the Declaration, and the Drivers were only entitled to fees on the trespass claims. Hussein's trespass claim was dismissed early in the litigation, and the Grotes' trespass claim was settled with the Drivers, resulting in the voluntary dismissal of that cause of action with each party "to bear their own attorney's fees and costs." Therefore, we reverse the award to the Drivers, but remand to the trial court to exercise its discretion to award both the Drivers and the Parents appropriate attorney fees incurred in defense of Hussein's trespass claim prior to its dismissal in November 2009. We affirm the award of attorney fees from the Grotes to the Parents on the Grotes' trespass claim.

II.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts as taken from our 2014 decision:

"The condominium project is a three-unit complex that includes three parking spaces. At the center of this controversy is the disputed issue of the ownership of one of these parking spaces and how this dispute affected the marketability of one of the units in the busy Cole Valley neighborhood. On November 19, 1982, Richard Crofton–Sleigh and Michele P. Crofton–Sleigh (collectively 'Declarants'), who at that time owned the entire building, recorded an 'Enabling Declaration Establishing a Plan for Condominium

[1] California Style Manual [CSM] (4th ed. 2000), Case Titles, section 6:3, page 212, states in relevant part as follows: "In an appeal by both the plaintiff and defendant, both are called "Appellant" and neither is called "Respondent"; it is implicit that both are respondents to each other's appeal." In order to comport with this rule, and to avoid confusion with the identifying terms "appellants" and "respondents" which we used to reference the parties in our 2010 and 2014 opinions, here we shall use the terms "plaintiffs" and "defendants" to refer to them collectively, and when referring to them separately, we shall identify them by their last names only, except when we quote from our 2014 opinion, *post*. No disrespect is intended.

Ownership' ('Declaration') dividing the property into three separate units. Declarants also recorded an accompanying parcel map ('Map') that identified three separate condominium units as: (a) Unit 201 (located on the second floor); (b) Unit 301 (located on the third floor); and (c) Unit 401 (located on the fourth floor) and a garage on the ground floor. The Map identifies three parking spaces in the garage, namely parking spaces P–1, P–2, and P–3 and indicates these are 'parking areas, easement for the exclusive use of said areas shall be granted as appurtenances of particular units.'

"The Declaration defines a 'Common Area' as 'all lands and improvements not within any Unit' and grants each Unit, as appurtenant to its property, undivided interest in the Common Areas. Such undivided interest 'cannot be altered without the consent of all the Unit Owners affected. . . .' The Declaration further defines 'Restricted Common Areas' as areas 'set aside and allocated for the exclusive use of the Owners of the Units' and that '[s]uch easements shall be appurtenant to the respective Units as granted by Declarant in the deed to the purchasers of the respective Units.'

"The deed for the original transfer of Unit 301 included an exclusive easement to use the parking area designated as P–2 on the map. The deed for the original transfer of Unit 201 included an exclusive easement to use the parking area designated as P–3 on the map. When appellant [Hussein] purchased Unit 401 [o]n June 22, 2005, the deed to his Unit 401, and the deeds previously recorded, differed from the deeds to Unit 201 and Unit 301 because it *did not* include an easement for exclusive use of P–1, one of the three parking spaces.

"On or about October 18, 2006, Meredith Martin, a real estate agent with Paragon Real Estate Group ('Paragon') listed Unit 401, owned by appellant, for sale. Martin received an email from Chicago Title Company stating that no parking space had been deeded to Unit 401 and that this omission in the deed could be corrected if the owners of Unit 201 and Unit 301 deeded parking space P–1 to appellant. Martin requested that the owners of Unit 301 and Unit 201 sign a 'draft deed that would correct the omitted parking exclusive easement for this property [Unit 401].' Martin sent a draft deed which proposed to grant appellant '[a]n exclusive easement, appurtenant to and for the benefit

of unit # 401 to use the Parking area(s) designated as P–1 on the Map.' The owners of Unit 201 agreed to execute the necessary documents, and they have never claimed any ownership interest in parking space P–1.

"However, a resident of Unit 301, respondent Driver (who is an attorney) researched the deed history on all the units and summarized his findings in two emails responding to the request of appellant's real estate broker. Driver explained respondents' position that parking space P–1 was not an exclusive easement owned by appellant, but instead was legally part of the common area owned by the HOA [homeowners association], and therefore was available for use by any of the other owners. He also claimed appellant was not entitled to sell rights to parking space P–1 to any purchaser of Unit 401. It is undisputed that after the problem with appellant's title came to light, respondent Driver occasionally parked his vehicle in parking space P–1.

"Appellant took steps to rectify the omission in the deed. He requested that the Association vote to enact a 'policy' that assigned each parking space to an individual unit. Appellant also recorded a new deed from the original Declarant that attempted to retroactively grant appellant an exclusive easement to use parking space P–1. Nevertheless, appellant was unsuccessful in getting respondents to back away from their position that parking space P–1 was not owned by appellant, but instead was part of the common area owned by the HOA, and available for use by all the owners.

"Appellant eventually sold Unit 401 to Gary E. Grote and Janice P. Grote (the Grotes) in early to mid-December 2008. However, appellant believed that the ongoing dispute with respondents, especially with regard to whether or not a prospective purchaser would have exclusive use of a parking space, discouraged prospective buyers and resulted in the value of the condominium being diminished.

"Appellant and the Grotes filed this action in December 2008, alleging seven causes of action against respondents and the HOA. On May 28, 2009, appellant and the Grotes filed their second amended complaint, the operable complaint for purposes of summary judgment. On November 20, 2009, the seventh cause of action for quiet title to

parking space P–1 was voluntarily dismissed and the HOA was dismissed as a party after the dispute over the parking space was settled.

"Thereafter, on April 7, 2011, respondents filed their motion for summary judgment and/or summary adjudication 'to resolve the following causes of action, that are [primarily] based . . . on the same basic dispute alleged in the quiet title cause of action but that were not otherwise resolved in the settlement and remain at issue.' These cause[s] of action included: (1) appellant's and the Grotes' cause of action for slander of title; (2) appellant's cause of action for intentional interference with contractual relations; and (3) appellant's causes of action for intentional and negligent interference with prospective economic advantage.

"On March 9, 2012, the trial court entered judgment against appellant after granting respondents' motion for summary judgment. The court's grant of summary judgment disposed of all viable claims against appellant. The only cause of action in the second amended complaint that remains viable is the cause of action for trespass bought by the Grotes against respondents. Respondents' cross-complaint against the Grotes for nuisance, indemnity, and contribution also remains. At the Grotes' request, the court stayed any further action on this case pending resolution of this appeal. Appellant timely appealed from the judgment entered in respondents' favor." (*Hussein v. Driver* (Jan. 24, 2014, No. A134745 [nonpub.]) 2014 Cal.App. Lexis 530 at *1–8, fns. omitted, original italics.)

We affirmed the trial court. We held that defendants' statements regarding the ownership of parking space P-1 did not constitute false statements of fact to support a slander of title claim. (*Hussein v. Driver*, *supra*, 2014 Cal.App. Lexis 530 at *7.) The trial court properly found that plaintiffs could not prevail on their claims for interference with contract based on Hussein's efforts to sell Unit 401 to Katharina Rock because Hussein could not plead and prove the existence of an enforceable contract. (*Id*. at *16-23.) Plaintiffs failed to raise a triable issue of fact in their claims for intentional and negligent interference with economic advantage because they could not demonstrate wrongful conduct based upon defendants' statements about the parking space. (*Id*. at

*20-24.) We affirmed the summary judgment award as to all claims except the Grotes' trespass cause of action which was included in the motion for summary judgment, and consequently not an issue in the 2010 appeal (*Driver v. Hussein* (Oct. 1, 2010, A126534 [nonpub.]) 2010 Cal.App. Lexis 7872).

After this court affirmed the award of summary judgment, the Drivers filed a motion for attorney fees against both the Grotes and Hussein. The Drivers argued they were entitled to attorney fees under Civil Code sections 5975 and 1717[2] because the complaint was filed to enforce the Declaration. The Drivers contended the fee award should be joint and several because the Grotes, as assignees of Hussein, assumed both the benefits and the burden of the assignment. They requested $402,537.21 in attorney fees.

The Grotes opposed the motion, arguing the civil action was not to enforce the Declaration; it alleged only tort claims pursued by Hussein. Therefore, the fee request included amounts for unrecoverable claims. They contended the only claim "remotely connected" to the Declaration is Hussein's trespass claim, which had been dismissed in 2009. Therefore, defendants would, at most, be entitled to $20,265.50 in recoverable fees for the trespass claim.

Hussein also opposed the motion, arguing his claims were not to enforce the Declaration. In addition, he argued that the assignment of his interest in the lawsuit to the Grotes extinguished his standing, and therefore he was not responsible for attorney fees.

In their reply, the Drivers stated that they had analyzed their request, and determined the fee award should be reduced by $27,458. Their modified request was for $370,336.71.

On February 5, 2015, the court issued an order after oral argument ("first fee order"). The court found that defendants were the prevailing parties and were entitled to their reasonable attorney fees in the amount of $400,356.87.[3] The court found the Grotes

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[2] All subsequent statutory references are to the Civil Code unless otherwise identified.

[3] It is unclear how the court arrived at precisely this amount. The original fee request was for $402,537.21. The modified fee request was $370,336.71.

and Hussein "jointly and severally liable for the attorneys' fees." Plaintiffs' causes of action "centered on the parking space they sought," relying on the Declaration. The court rejected Hussein's argument that he had no standing during the entire action because he "strenuously prosecute[d] this action." The court found the purported assignment to the Grotes did not prevent Hussein from active involvement in the case.

On February 13, 2015, after the court ruled on the first fee motion, the Drivers and the Grotes settled the only remaining claim against the Drivers for trespass (their claim against the Parents had previously been dismissed, as discussed below), and a request was filed to dismiss that last cause of action. The request for dismissal stated: "Parties to bear their own attorney's fees and costs."[4]

On March 27, 2015, Hussein filed a notice of appeal from the first fee order, and on April 1, 2015, the Grotes filed their notice of appeal.

In April 2015, the Parents then filed a separate attorney fees motion relating to the trespass cause of action. The Parents did not seek recovery pursuant to the court's first fee order. The Parents had prevailed on their original summary judgment motion that included all the causes of action except the trespass claim. They then filed a summary judgment motion on the trespass claim. After it was fully briefed, the Grotes dismissed the trespass action against the Parents on December 8, 2014. The Parents argued the dismissal of the claim just days before the hearing on the motion for summary judgment did not relieve the Grotes of liability for attorney fees under section 5975.

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[4] In a declaration filed by Janice Grote in opposition to the third fee motion, she states that the Drivers are "not entitled to fees on the Trespass cause of action since it was also settled and dismissed, with the 'Parties to bear their own attorney's fees and costs.' " The Grotes reference the dismissal of the trespass claim in two footnotes in their appellate brief. They assert defendants admitted in their third fee motion that any fees for the trespass claim were improper. This is an overstatement in that the Drivers only state that the fee request should be reduced by $3,895 for the trespass claim. Defendants only mention the dismissal of the trespass claim in a footnote in their brief.

Hussein does not mention the settlement or dismissal. Early in the case in August 2009, the court granted defendants' demurrer to the complaint to Hussein's sixth cause of action for trespass. We discuss this in greater detail below.

On April 10, 2015, the trial court entered judgment in favor of the Drivers on all causes of action. On April 23, 2015, the Drivers then filed a third fee motion. The third fee motion sought the same attorney fees as the first fee order with a slight reduction in the amount to $398,357.21. The third fee motion was filed in "an abundance of caution" to avoid any argument that defendants had waived their right to obtain attorney fees from the April 10, 2015 final judgment even though plaintiffs had already filed a notice of appeal for the first fee award.

On May 18, 2015, the court issued an order granting the Parents' motion for attorney fees against the Grotes in the amount of $18,764.50 (second fee order).

The court also issued a new order granting the Drivers' motion for attorney fees against plaintiffs in the amount of $398,357.21 (third fee order). The order stated: "Defendants are the prevailing parties and are entitled to recover their attorneys' fees pursuant to the contract under which they were being sued [and] pursuant to statute. Attorneys' fees are reasonable under the circumstances of this case."

After defendants obtained the third fee order, the Grotes and Hussein once again appealed. The parties filed a stipulation and motion with this court requesting consolidation of their appeals on the first fee order and third fee order because defendants sought fees for the same claims in both orders. This court consolidated the cases.

III.

DISCUSSION

A. Award of Attorney Fees

Whether attorney fees may be awarded is a question of law, which we review de novo. (*Dzwonkowski v. Spinella* (2011) 200 Cal.App.4th 930, 934.) The amount of an attorney fees award is reviewed for abuse of discretion. (*Ibid.*)

"With regard to an award of attorney fees in litigation, California generally follows what is commonly referred to as the 'American Rule,' which provides that each party to a lawsuit must ordinarily pay his or her own attorney fees. [Citation.]" (*Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1142.)

1. Grounds Asserted for the Recovery of Attorney Fees and Costs and the Authorization for Attorney Fees in the Declaration

The briefs raise two main bases for the recovery of attorney fees in this case: sections 1717 or 5975.

Section 1717 provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, *which are incurred to enforce that contract,* shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be *the party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a), italics added.)

Section 5975 (former section 1354) provides for the recovery of attorney fees and costs incident to the enforcement of covenants and restrictions in an HOA declaration: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both." (§ 5975, subd. (a).) It further provides that in "an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (§ 5975, subd. (c).)

Each statutory ground for recovery of fees and costs is dependent fundamentally upon the scope of the attorney fees and cost provision in the Declaration. Here, that document provided: "The Association or any Owner, shall have the right *to enforce by any proceeding at law or in equity*, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, and in such action shall be entitled to recover reasonable attorneys' fees as are ordered by Court." An "owner" is defined as the record holder of title to a condominium.

Since the recovery of fees and costs is contingent upon the assertion of claims that seek the enforcement of rights provided under the Declaration, we must turn our attention next to parse the causes of action contained in the operative second amended complaint

(complaint).[5] Plaintiffs allege an ongoing dispute between Hussein and the Drivers about the parking space as well as repair and maintenance issues at the complex. David Driver communicated to numerous parties including real estate brokers and potential lenders that Hussein did not have exclusive use of parking space P-1. The first cause of action for slander of title alleges that defendants communicated with other parties that Hussein was not entitled to sell the rights to parking space P-1 along with Unit 401. It further alleges that Driver sent "bogus assessment and lien claims" to third parties including real estate brokers, prospective purchasers, and lenders. Hussein alleged that this resulted in the diminution of value of his condominium.

The second cause of action for intentional interference with contractual relations, the fourth cause of action for intentional interference with prospective economic advantage, and the fifth cause of action for negligent interference with prospective economic advantage allege that defendants interfered with a prospective contract between Hussein and Katharina Rock to purchase Unit 401. The complaint alleges that defendants interfered with the contract by "wrongfully asserting" that Unit 401 "did not include any exclusive parking easement."

The sixth cause of action for trespass alleges that Hussein and then the Grotes held title to Unit 401, which included an exclusive easement to parking space P-1. It alleges that David Driver parked his vehicle in parking space P-1. The seventh cause of action to quiet title alleged that the Grotes were entitled to ownership of parking space P-1 under the deed and Declaration.

For each cause of action, plaintiffs alleged they were entitled to attorney fees pursuant to the Declaration. Despite the prayer for relief in their complaint, the Grotes argue the Declaration only provides for attorney fees for actions to *enforce* claims and

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[5] The second amended complaint lists six causes of action, but only contains five actual claims because one cause of action is blank: (1) slander of title; (2) intentional interference with contractual relations; (3) the cause of action is left blank; (4) intentional interference with prospective economic advantage; (5) negligent interference with prospective economic advantage; and (6) trespass. The seventh cause of action in the original complaint for quiet title was settled by the parties.

does not include the right to sue for a tort committed by one member against another, even if the tort affects the member's property rights. The Declaration was used as evidence for the claims, but it was not the basis for the claims. Hussein similarly argues that the claims were tort causes of action, not actions to enforce the Declaration.

As discussed below, under either sections 1717 or 5975, we conclude that the Declaration is not broad enough to allow for the recovery of attorney fees and costs related to plaintiffs' claims, with the exception of the trespass cause of action.[6]

2. Attorney Fees Under Section 1717

A critical limitation to the recovery of fees and costs under section 1717 is that it normally pertains only to contract claims. "If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims. [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615 (*Santisas*).)

To invoke section 1717 and its reciprocity principles, a party must show "(1) he or she was sued on a contract containing an attorney fee provision; (2) he or she prevailed on the contract claims; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed. [Citations.]" (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.) The court must disregard any tort claims included in the action when determining whether section 1717 applies. (*Ibid.*) "Section 1717's reciprocity principles therefore make a unilateral attorney fee provision reciprocal only on contract claims; they do not make a unilateral provision reciprocal on tort claims. [Citations.]" (*Id.* at p. 828; see also *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708 (*Exxess*) ["Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorneys' fees on a *contract claim only*" (original italics)].) However, California courts "construe the term 'on a contract' liberally." (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979 (*Turner*).)

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[6] Plaintiffs dismissed the seventh cause of action to quiet title on November 20, 2009. The parties resolved the quiet title action pursuant to a confidential settlement agreement that specified each side would bear their own fees and costs.

The Grotes argue that the claims here involved trespassing on the parking space, slandering Hussein's title, and interfering with his economic interests, which did not arise from the Declaration. The operative complaint alleges five tort causes of action. The claims for slander of title, interference with contractual relations and interference with prospective economic advantage are not actions "on a contract" under section 1717. Rather, they are based upon defendants' conduct arising out of the parties' dispute over the parking space.

Defendants contend that when determining whether an attorney fees provision applies courts look to the substance of the claims over their form. The gravamen of plaintiffs' causes of action was the right to an exclusive easement to parking space P-1, granted under the Declaration. They assert that the claims are actions "on the contract" because they are derived from the Declaration. This was also the basis for the trial court's ruling under section 1717 that all of the causes of action "related to" the Declaration, or "centered on the parking space they sought" relying on Declaration. This similar argument, however, has been rejected by other courts.

In *Exxess*, Exxess Electronixx leased a building from Masco Building Products Corporation. (*Exxess*, *supra*, 64 Cal.App.4th at p. 702.) After discovering several defects, Exxess sued its broker for declaratory relief, constructive fraud, breach of fiduciary duty, and equitable relief. (*Id.* at p. 702.) The lease agreement stated: "If any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party (as hereafter defined) or Broker in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorney's fees. . . ." (*Id.* at pp. 702–703.)

"As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.]" (*Exxess, supra,* 64 Cal.App.4th at p. 708.) The *Exxess* court determined the types of tort claims raised did not "enforce" a contract. (*Id*. at p. 709.) They were premised on a duty of the agent to disclose defects, not created

by the lease. (*Id.* at p. 710.) Similarly, in *Gil v. Mansano* (2004) 121 Cal.App.4th 739, the court found a "tort claim does not enforce a contract." (*Id*. at p. 743.)

In examining the specific provision of the contract that allows for attorney fees, in some cases the fee provision is broad and allows for the prevailing party to recover attorney fees on any action, so long as it is related to the contract. (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 183, disapproved on other grounds in *DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140 [lease agreement provided for attorney fees in " 'any legal action or proceeding brought by either party to this agreement' " and did not require the action be related to or arise out of the lease agreement]; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 334–335 [language was sufficiently broad to allow attorney fees for defense of fraud and breach of fiduciary duty claims where the attorney fee provision applied to "any dispute under" the agreement].)

While courts "construe the term 'on a contract' liberally" (*Turner*, *supra*, 175 Cal.App.4th at p. 979), here the narrow provision in the Declaration which provides for attorney fees in an action to enforce the restrictions, conditions, covenants, reservations, and liens within the Declaration is not broad enough to apply to tort claims.

Finally, we note plaintiffs' prayer sought recovery of attorney fees for each cause of action pursuant to the Declaration. There is no question that had plaintiffs prevailed, they would have argued they were entitled to attorney fees under the Declaration. We are sympathetic to defendants' view that it seems disingenuous for plaintiffs to now argue that their causes of action were not related to the Declaration, but this does not provide a basis for recovery. The fact that plaintiffs sought attorney fees does not mean that they are properly recoverable.

"The mere allegation in a complaint that the plaintiff is entitled to receive attorney fees does not provide a sufficient basis for awarding them to the opposing party if the plaintiff does not prevail." (*Sessions Payroll Management, Inc. v. Noble Construction Co*. (2000) 84 Cal.App.4th 671, 681–682.) "To visit a losing claimant's own demands upon him might appeal to a sense of playground justice, but it has no basis in our law.

We see no reason to treat attorney fees differently from any other form of relief for these purposes. We know of nothing in our law that justifies awarding such fees to a party merely because his opponent asked for them." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 899 (*Blickman*).) Section 1717 simply does not purport to authorize an award of fees where neither party is entitled to them. (*Blickman*, at p. 899.) "A party claiming fees under section 1717 must 'establish that the opposing party *actually* would have been entitled to receive them if he or she had been the prevailing party.' (Original italics." (*Blickman*, at p. 899, fn. omitted, quoting *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1307.)

Defendants cannot demonstrate that here. Plaintiffs' tort causes of action are not recoverable under section 1717 based on the language of the Declaration.

3. Attorney Fees Authorized by Statute Under Section 5975

The trial court did not address the application of section 5975, but defendants argue that plaintiffs' claims were to enforce the Declaration and fell within the statute. Both the Grotes and Hussein again argue that section 5975 provides for attorney fees for enforcement of the Declaration, but not for tort claims. Like the analysis under section 1717, we conclude that plaintiffs' claims were not to enforce the Declaration, even if they arose out of the parking space dispute.

In *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360 (*Chee*), Chee brought a cause of action seeking a declaration that the HOA declaration created the right for her to be compensated for injuries caused by the tenant of one of the owners. (*Id*. at p. 1380.) Chee was injured by the tenant's dog. Chee argued that the declaration limited residents to one small pet and required the pet to be restrained at all times in common areas. (*Id.* at p. 1365.) The trial court entered judgment for the owner and HOA and they requested attorney fees. (*Id.* at p. 1367-1368.) Chee opposed the motion for attorney fees, arguing that her causes of action were not brought to enforce the declaration under former section 1354 (now section 5975). (*Chee*, at p. 1368.) The trial court granted the fee motion in part, only allowing fees for the breach of contract and

declaratory relief claims, but not in defense of the negligence and nuisance claims. (*Ibid.*)

The court held that Chee's breach of contract and declaratory relief claims sought to enforce her rights under the HOA, and thus the owner and HOA were entitled to attorney fees. (*Chee, supra,* 143 Cal.App.4th at p. 1380.) However, the court held that the trial court properly apportioned the fees incurred in defending the causes of action to enforce the contract and those attributable to the tort claims. (*Id.* at p. 1381.)

By granting the defendants' motion in part, apportioning the fees, and awarding fees only for those causes of action that fell within section 5975, *Chee* supports plaintiffs' contention that attorney fees are not properly awarded for tort claims. At the same time, it also supports defendants' claim that they are entitled to attorney fees under section 5975 for the trespass claim which was brought to enforce plaintiffs' rights under the Declaration.

Our case is distinguishable from *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007 (*Farber*), a case relied on by defendants. In *Farber*, David Stiffler bought a condominium from Alicia Farber. (*Id.* at p. 1009.) The condominium was subject to a declaration of covenants, conditions and restrictions (CC&R's). Each unit owner was a member of the condominium association. (*Ibid.*) Once Stiffler moved in, he discovered the roof leaked, and he thought Farber should fix it. (*Id.* at p. 1010.) Farber believed the association should make the repairs. (*Ibid.*) Farber filed an action for declaratory relief against Stiffler and the association. The association filed a successful demurrer alleging that since Farber was no longer an owner and member of the association, it had no duty to her and she lacked standing to enforce the CC&R's. (*Ibid.*) Farber argued she had standing to sue because her complaint did not seek to enforce the CC&R's, she only sought to enforce the association's obligations to Stiffler. (*Id.* at p. 1011.) "The essence of Farber's claim is that the CC&R's require the Association to fix Stiffler's roof. We cannot regard that as anything but an attempt to enforce the CC&R's." (*Id.* at p. 1012.) The court further held that because the action was to enforce the CC&R's, the association was entitled to attorney fees. (*Id.* at p. 1014.)

Plaintiffs' action was not to enforce the Declaration like the plaintiff in *Farber*. While it is true that the complaint, pleadings, and discovery responses repeatedly reference the Declaration, and throughout this litigation the court and the parties looked to the Declaration to support or defend against the claims, the claims themselves were not to *enforce* the Declaration. Plaintiffs' claims for slander of title, interference with contract, and interference with prospective economic advantage involved defendants' alleged interference with the sale of Unit 401. For example, the elements for slander of title are (1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1051.) The elements for the tort of intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by defendant's acts. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) These claims simply do not seek to enforce the terms of the Declaration.

The entire litigation arose out of the parking space dispute, but the causes of action were based on defendants' statements about Hussein and the property, with the exception of the quiet title and trespass claims. The dismissed quiet title claim sought a direct determination of who was the rightful owner of the parking space or sought to enforce the CC&Rs in the Declaration.

Therefore, with the exception of the trespass claim, section 5975 does not provide a basis for recovery of attorney fees.[7]

4. Procedural Issues Relating to the Trespass Claim

We have concluded that the operative complaint contained one claim, trespass to property, which appears to fall within the ambit of sections 1717 and 5795, but there are several procedural issues the parties nevertheless contend prevent recovery of attorney fees. First, the trespass claim against the Parents was dismissed prior to the court ruling on their summary judgment motion which the Drivers argue prevents recovery pursuant to section 1717. Second, the trespass claim against the Drivers was settled and dismissed just after the hearing on the first attorney fee motion. That dismissal contains a notation: "Parties to bear their own attorney's fees and costs," potentially barring recovery under section 5975. Third, respondents' demurrer to Hussein's trespass claim was sustained early in the case in 2009, raising the inference that only a small amount of fees and costs fairly can be attributed to that claim.

We first address the effect of the Grotes' voluntary dismissal of their trespass claims against the Parents. A party cannot recover fees under section 1717 for contract claims that have been dismissed. (*Santisas*, *supra*, 17 Cal.4th at p. 619.) Section 1717, subdivision (b)(2) provides: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." (§ 1717, subd. (b)(2).) Our Supreme Court has held, however, that "in voluntary pretrial dismissal cases, Civil Code section 1717 bars recovery of attorney fees incurred in defending contract claims, but that neither Civil Code section

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[7] Defendants argue the court's fee award was also proper under California Code of Civil Procedure (CCP) sections 1021 and 1032. Under CCP section 1032, "costs" include attorney fees if authorized by contract. Attorney fees are recoverable as costs under CCP section 1032 when they are authorized by a contract, statute or by law. (CCP § 1033.5, subd. (a)(10); *Santisas*, *supra*, 17 Cal.4th at p. 606.)

The problem with defendants' argument is it, once again, relies on the language of the Declaration. The Declaration does not provide a contractual right of recovery for attorney fees for tort claims, so these sections are not applicable.

1717 nor [*International Industries, Inc. v.*] *Olen* [(1978)] 21 Cal.3d 218, bars recovery of attorney fees incurred in defending tort or other noncontract claims. Whether attorney fees incurred in defending tort or other noncontract claims are recoverable after a pretrial dismissal depends upon the terms of the contractual attorney fee provision." (*Santisas, supra,* 17 Cal.4th at p. 602.) "If the voluntarily dismissed action also asserts causes of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action." (*Santisas,* at p. 617.)

As explained above, the attorney fee provision in the Declaration was not worded in such a way to allow for the recovery of attorney fees for non-contract claims. The Parents cannot recover attorney fees for the trespass claim under section 1717, but they may be entitled to recovery under section 5975.

In *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 875 (*Parrott*), the homeowner filed an injunctive and declaratory relief action against the homeowners' association to prevent a special assessment on the properties. The homeowner later dismissed his complaint after the court denied a preliminary injunction. (*Ibid.*) The association argued it was entitled to attorney fees under former section 1354 (now section 5975). The court held that the trial court had jurisdiction to determine who was the prevailing party and award attorney fees even after the appellant's voluntary dismissal. (*Id.* at p. 877.) The homeowner argued that under section 1717, there is no prevailing party when an action is voluntarily dismissed. (*Id.* at p. 878.) The court held that section 1717 does not bar a fee award when the right to recover attorney fees arose under the statute (current section 5975). Section 5975 is "an independent fee-shifting statute, and a prevailing party would be entitled to its fees under this statute even without a contractual fee provision. [Citation.]" (*Id.* at p. 879; see also *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146 [the HOA was entitled to attorney fees under section 5975 (former section 1354) where plaintiff dismissed eight of her ten causes of action on the eve of trial].)

The *Parrott* court further held that the trial court must exercise its jurisdiction to determine who is the prevailing party, relying on *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568 (*Heather Farms*). (*Parrott, supra*, 112 Cal.App.4th at p. 877.) A "trial court has the authority to determine the identity of the 'prevailing party' in litigation, within the meaning of Civil Code section 1354, for purposes of awarding attorney fees." (*Heather Farms, supra*, 21 Cal.App.4th at p. 1570.) The analysis should be made by determining who prevailed on a "practical level." (*Id.* at p. 1574.) Our Supreme Court had held attorney fees should not be awarded automatically in the event of a voluntary dismissal, the court should "base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. [Citation.]." (*Santisas, supra*, 17 Cal.4th at p. 622.)

Here, the trial court determined the Parents were the prevailing parties and were entitled to recover attorney fees "under the circumstances of this case." As noted, section 5975 provides for attorney fees for an action to enforce an HOA declaration. The trespass claim sought to enforce the Grotes' right to exclusive use of parking space P-1 under the Declaration. (See *Chee, supra*, 143 Cal.App.4th at p. 1380.) The "essence" of the trespass claim was that the Declaration entitled them to exclusive use of the parking space and respondents had violated the Declaration by trespassing on that right. (See *Farber, supra*, 141 Cal.App.4th at p. 1012.) The Grotes would have been entitled to attorney fees for the trespass claim so the Parents, are equally entitled to fees on that claim. The Parents correctly argue that the Grotes cannot avoid liability for attorney fees by dismissing the trespass claim just days before resolution of the Parents' summary judgment motion. Therefore, we conclude the trial court properly found the Parents are entitled to attorney fees as the prevailing party on the trespass claim against the Grotes.

Next, we examine the Grotes dismissal of their trespass claim against the Drivers. We agree with the Grotes that the Drivers are precluded from the recovery of attorney fees on the trespass claim based upon the agreement they made with the Grotes at the time the claim was dismissed. From the language of the request for dismissal, both

parties agreed to bear their own attorney fees and costs on the trespass claim. Thus, the Drivers are not entitled to recovery under section 5975 against the Grotes.

The more difficult issue that was not adequately briefed by the parties is what recovery is allowable against Hussein. The trespass cause of action in the complaint was brought by both Hussein and the Grotes against the Drivers and the Parents. Early in the case, both the Drivers and the Parents filed demurrers to Hussein's trespass claim. The court granted both demurrers to Hussein's trespass claim in August 2009. The order is not included in the record, but the docket entry states: "Demurrer sustained without leave to amend as to Plaintiff Hussein regarding the sixth cause of action for trespass. Hussein fails to plead trespass [that] damag[es] an ownership interest as described in *Hassol*[*d*]*t v. Patrick Media Group*[, *Inc.*] (2000) 84 Cal.App.4th 153, 171." (Italics added.)

Therefore, from August 2009 onward the trespass claim was prosecuted solely on behalf of the Grotes. Accordingly, the Parents may seek recovery of their attorney fees against the Grotes for the entire period before the trespass claim was dismissed by them, and both the Drivers and the Parents are entitled to recovery against Hussein for attorney fees incurred in defense of his trespass claim prior to August 2009. The trial court did not address how properly to apportion fees in light of granting defendants' demurrers to Hussein's trespass claim early in the litigation. The court appeared to presume that Hussein was still jointly and severally liable for the recovery of any fees.[8]

Given our conclusion that the only attorney fees the Drivers may recover against Hussein are based on the trespass claim which was dismissed on demurrer in 2009, on

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[8] This joint and several liability was based upon the fact the parties jointly prosecuted the action and upon the assignment contract.

In November 2008, Hussein, as the assignor, entered into an "Assignment of Claims" with the Grotes. Hussein assigned his claims, causes of action, and resulting damages, remedies and recoveries against defendants to the Grotes, including the trespass claim. It granted the Grotes the right to bring and prosecute all claims in their own name or in Hussein's name. It further provided that the Grotes shall pay to Hussein one-half of the net recovery of any monetary damages arising out of the litigation.

remand the trial court must apportion the fees to that specific claim.[9] "The trial court is the best judge of the value of professional services rendered in its court." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.)[10]

IV.

DISPOSITION

We affirm the second fee award to the Parents for $18,764.50 for their fees related to the trespass claim brought by the Grotes. We reverse and remand to the trial court on the duplicative first and third fee orders. The Drivers are not entitled to recover attorney fees against the Grotes. The trial court shall conduct further proceedings consistent with this opinion to determine the amount of attorney fees both the Drivers and the Parents reasonably incurred in defending against Hussein's trespass claim. The parties are to bear their own costs on appeal.

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[9] The parties' arguments about joint and several liability are largely rendered moot by our conclusion that attorney fees are only properly recoverable by the Parents as to the respective trespass claims pursued by the Grotes and Hussein, and to the Drivers for Hussein's trespass claim prior to its dismissal in 2009.

[10] Given our reversal of the Drivers' fees and costs attributable to the Grotes claims, we need not address the Grotes' alternative arguments that the trial court erred in calculating the amount of the attorney fees award in both the first and third fee orders, or that the fee award was unreasonable.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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STREETER, J.